Filed 6/6/16 In re T.K. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re T.K., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. X.B. et al., Defendants and Appellants.	E064828 (Super.Ct.No. J261897) OPINION

APPEAL from the Superior Court of San Bernardino County. Lynn M. Poncin, Judge. Affirmed and remanded with instructions.

Johanna R. Shargel, under appointment by the Court of Appeal, for Defendant and Appellant X.B.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant R.S.

Jean-Rene Basle, County Counsel, and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

Defendants and appellants X.B. (father) and R.S. (mother) are the parents of T.K., (child), who was born in 2010 and is the child at issue in the present dependency matter. The trial court removed the child from parental custody and ordered reunification services for the parents. On appeal, mother and father do not challenge the substance of the trial court's jurisdictional findings or dispositional orders, but contend that those findings and orders should be reversed for failure to comply with the requirements of the Indian and Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.). Plaintiff and respondent San Bernardino County Children and Family Services (CFS) concedes that there were "ICWA noticing deficiencies" and that the matter should be remanded to the trial court to resolve those deficiencies, but argues that we should not disturb the trial court's jurisdictional and dispositional orders. We agree with CFS, and affirm the jurisdictional findings and dispositional orders, remanding for the limited purpose of directing the trial court to order CFS to complete the ICWA inquiry and comply with ICWA notice requirements.

I. FACTS AND PROCEDURAL BACKGROUND

On September 2, 2015, CFS filed the petition pursuant to Welfare and Institutions Code section 300 that initiated this dependency matter. In the petition, CFS indicated, without elaboration, that ICWA inquiry had been made, and that the child had no known Indian ancestry. At the detention hearing on September 3, 2015, both mother and father were present, and each had completed a form entitled "Parental Notification of Indian

Status." Father indicated on the form that he had no Indian ancestry. Mother initially checked the same box, indicating she had no Indian ancestry, but wrote next to the box "unk?" During the hearing, the trial court asked whether the handwriting was meant to indicate that she may have Indian ancestry; she responded in the affirmative. The trial court instructed her to check the box stating that she "may have Indian ancestry," and mother did so, without indicating any specific tribe.

At a hearing on September 24, 2015, CFS informed the trial court that ICWA notice would be sent, as a "precautionary measure." On October 8, 2015, notice of a hearing set for October 22, 2015, was sent by certified mail to the three federally recognized Cherokee tribes, the Bureau of Indian Affairs (BIA), and the Secretary of the Interior, using the ICWA-030 form. The information sent regarding mother's relatives, however, was scant. Both the maternal grandmother of the child and a maternal aunt had attended hearings in the matter, and the maternal aunt had expressed interest in having the child placed with her. Nevertheless, the ICWA notification did not contain any information about the maternal aunt, and identified the maternal grandmother by name and address, but omitted her maiden name, if any, as well as her birth date and place of birth. CFS's ICWA declaration of due diligence makes no mention of any efforts to obtain information from either the maternal grandmother or the maternal aunt.

CFS also sent ICWA notices of the contested jurisdiction/disposition hearing, set for October 29, 2015. The declaration of due diligence, however, did not include certified mail receipts indicating that the ICWA notices had been received.

After hearing evidence on October 29 and November 5, 2015, the trial court found the child to come within Welfare and Institutions Code section 300, removed him from parental custody, and ordered reunification services for the parents.

II. DISCUSSION

Mother and father contend, and CFS agrees, that CFS failed to comply with ICWA noticing requirements, that the present appellate record does not demonstrate that CFS complied with ICWA inquiry requirements, and that the matter will have to be remanded to the trial court for those defects to be remedied. The parties differ only with respect to whether the trial court's jurisdictional findings and dispositional orders need to be vacated, pending completion of ICWA requirements. We agree with CFS that they do not.

ICWA was enacted "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ." (25 U.S.C. § 1902.) In general, ICWA applies to any state court proceeding involving the foster care or adoptive placement of, or the termination of parental rights to, a Native American child. (25 U.S.C. §§ 1903(1), 1911(a)-(c), 1912-1918, 1920-1921.) Under the notice provision of ICWA, if the court "knows or has reason to know that an Indian child is involved," the social services agency must "notify . . . the Indian child's tribe . . . of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) Welfare and Institutions Code section 224.2 requires ICWA notice to be sent via certified mail, return receipt requested, and that proof of the notice be filed with the court in advance of the noticed hearing. (Welf. & Inst. Code, § 224.2, subds. (a)(1), (c).) California Rules of

Court, rule 5.481(a), provides that the court and the county welfare department have "an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all proceedings identified in Rule 5.480," which includes proceedings under Welfare and Institutions Code section 300 et seq. (Cal. Rules of Court, rules 5.481(a), 5.480(1).) "A notice violation under ICWA is subject to harmless error analysis." (*In re Autumn K.* (2013) 221 Cal.App.4th 674, 715.)

As CFS concedes, the ICWA notice sent in the present case, and the proof of notice filed by CFS with the trial court, were insufficient in several respects. Although the maternal grandmother's name and address are included, her maiden name, if any, as well as birthdate and place of birth were omitted, and CFS's ICWA declaration of due diligence lacks any record of an interview with her.[1] There is also no indication in the record that CFS interviewed the child's maternal aunt regarding ICWA issues. The ICWA notices sent omit any information regarding the maternal aunt, even though she had been actively involved in the dependency process, attending hearings and expressing interest in having the child placed in her home. CFS also failed to submit proof that the ICWA notice of the October 29, 2015 hearing was sent via certified mail, return receipt requested, as required by statute. (Welf. & Inst. Code, § 224.2, subds. (a)(1), (c).) As the parties agree, the matter will have to be remanded to the trial court with instructions to

[1] CFS speculates that an interview with the maternal grandmother is how CFS determined to send ICWA notice to the federally recognized Cherokee tribes, as opposed to others, given mother's lack of knowledge. If so, the interview should have been documented in the record, and the maternal grandmother's information completed on the ICWA notices sent to the tribes.

order CFS to comply with the inquiry and notice provisions of ICWA, to the extent it has not already done so, and submit appropriate documentation of compliance with ICWA.

The parents argue that we should not only remand the matter for that limited purpose, but also vacate the trial court's jurisdictional findings and dispositional orders. We disagree. This court, and others, have routinely remanded for completion of ICWA inquiry and notice requirements while leaving the trial court's jurisdictional findings and dispositional orders intact. (E.g. *In re B.H.* (2015) 241 Cal.App.4th 603, 608-609 [conditionally reversing order terminating parental rights, leaving jurisdictional findings and dispositional orders intact]; *In re Christian P.* (2012) 208 Cal.App.4th 437, 452-453 [affirming jurisdictional/dispositional orders, remanding for limited purpose of ICWA compliance].)

We are aware that some cases have done otherwise, and mother's briefing cites to some of those cases in support of her position, such as *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267, and *In re Desiree F.* (2000) 83 Cal.App.4th 460, 474. However, these cases have been criticized and/or distinguished by other Courts of Appeal, including this one. (E.g. *In re E.W.* (2009) 170 Cal.App.4th 396, 400-401; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1410.) We are persuaded that where, as here, no order terminating parental rights has been entered, reversal of the existing orders of the juvenile court is not necessary to preserve the remedy provided under ICWA, and would serve only to create instability and uncertainty for the child. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 385 [error in compliance with notice provisions of ICWA does not require reversal except on an order terminating parental rights].) If, after proper

notice is given, the child is determined to be an Indian child, the child, his parents, and the tribe may petition the trial court to invalidate any orders that violated ICWA. (*In re Christian P.*, *supra*, 208 Cal.App.4th at pp. 452-453.)

III. DISPOSITION

The orders appealed from are affirmed, and the matter is remanded for the limited purpose of directing the trial court to order CFS to complete the ICWA inquiry, to comply with the notice provisions of ICWA, and to file all the required documentation with the trial court for its inspection. If, after proper inquiry and notice, a tribe claims the child as an Indian child, the trial court shall proceed in conformity with all provisions of ICWA, and the child, the parents, and the tribe may petition the trial court to invalidate any orders that violated ICWA. If, on the other hand, no tribe makes such a claim, the prior defective notice becomes harmless error.

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HOLLENHORST
Acting P. J.

We concur:

MILLER
J.

SLOUGH
J.